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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 DOUGLAS JAMES ASHBY

10 Plaintiff,

11 v.

12 NANCY A BERRYHILL, Deputy
13 Commissioner of Social Security for
14 Operations,

Defendant.

CASE NO. 2:17-CV-01576-DWC

ORDER AFFIRMING DEFENDANT'S
DECISION TO DENY BENEFITS

15 Plaintiff Douglas James Ashby, proceeding *pro se*, filed this action, pursuant to 42 U.S.C.
16 § 405(g), for judicial review of Defendant's denial of his application for disability insurance
17 benefits ("DIB"). Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local
18 Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate
19 Judge. *See* Dkt. 9.

20 After considering the record, the Court concludes Plaintiff has failed to show the
21 Administrative Law Judge ("ALJ") erred in determining: (1) Plaintiff's severe impairments at Step
22 Two; (2) Plaintiff did not meet or equal a Listing at Step Three; and (3) Plaintiff's residual
23 functional capacity ("RFC"). Accordingly, the decision of the Deputy Commissioner of Social
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1 Security for Operations (“Commissioner”) is affirmed pursuant to sentence four of 42 U.S.C. §
2 405(g).

3 FACTUAL AND PROCEDURAL HISTORY

4 On March 31, 2016, Plaintiff filed an application for DIB, alleging disability as of
5 October 1, 2015. *See* Dkt. 11, Administrative Record (“AR”) 15. The application was denied on
6 initial administrative review and on reconsideration. *See* AR 15. A hearing was held before ALJ
7 S. Andrew Grace on November 10, 2016. *See* AR 37-67. On April 21, 2017, the ALJ held a
8 supplemental hearing. AR 68-103. In a decision dated June 15, 2017, the ALJ determined
9 Plaintiff to be not disabled. AR 15-28. Plaintiff’s request for review of the ALJ’s decision was
10 denied by the Appeals Council, making the ALJ’s decision the final decision of the
11 Commissioner. *See* AR 1-6, 20 C.F.R. § 404.981, § 416.1481.

12 In the Opening Brief, the Court finds Plaintiff is arguing the ALJ erred by: (1) failing to
13 find all Plaintiff’s impairments severe at Step Two; (2) failing to properly consider Plaintiff’s
14 combination of impairments at Step Three; and (3) improperly assessing Plaintiff’s RFC. Dkt.
15 14.^{1, 2}

16 STANDARD OF REVIEW

17 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of
18 social security benefits if the ALJ’s findings are based on legal error or not supported by
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20 ¹ Defendant asserts Plaintiff raised the following grounds in his Opening Brief: (1) Did the ALJ reasonably
21 weigh the medical opinions of record?; (2) Did the ALJ reasonably evaluate Plaintiff’s symptom testimony?; and (3)
22 Does substantial evidence show Plaintiff is able to work despite his impairments? Dkt. 15. The Court recognizes
23 Plaintiff has not briefed his assignments of error in a traditional manner; rather, he submitted a letter detailing his
24 disagreements with the ALJ’s decision. Therefore, the Court finds the assignments of error are as listed in the body
of this Order, not as outlined by Defendant.

² At the end of his Opening Brief, Plaintiff requests appointed counsel if the Court thinks he needs an
attorney. Dkt. 14, p. 2. The Court has previously determined Plaintiff has not shown appointment of counsel is
appropriate in this case. Dkt. 8. In his Opening Brief, Plaintiff provides no argument regarding his request for
counsel. Therefore, the Court declines to appoint counsel in this case.

substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

DISCUSSION

I. Whether the ALJ erred at Step Two.

In the Opening Brief, Plaintiff states he suffers from emphysema, diabetes, Charcot-Marie-Tooth, sleep apnea, arthritis, and depression. Dkt. 14. The Court finds Plaintiff is alleging the ALJ erred by failing to find some of his diagnoses to be severe impairments at Step Two of the sequential evaluation process.

Step Two of the administration's evaluation process requires the ALJ to determine whether the claimant "has a medically severe impairment or combination of impairments." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (citation omitted); 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii) (1996). An impairment is "not severe" if it does not "significantly limit" the ability to conduct basic work activities. 20 C.F.R. §§ 404.1521(a), 416.921(a). "Basic work activities are 'abilities and aptitudes necessary to do most jobs, including, for example, walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling.'" *Smolen*, 80 F.3d at 1290 (quoting 20 C.F.R. §140.1521(b)). "An impairment or combination of impairments can be found 'not severe' only if the evidence establishes a slight abnormality having 'no more than a minimal effect on an individual[']s ability to work.'" *Id.* (quoting *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988) (adopting Social Security Ruling "SSR" 85-28)).

Here, the ALJ found Plaintiff suffered from the following severe impairments: diabetes mellitus³, Charcot-Marie-Tooth, obesity status post gastric bypass surgery, chronic obstructive

³ "Diabetes mellitus" is commonly referred to as "diabetes."

1 pulmonary disease (“COPD”), sleep apnea, chronic pain syndrome, neuropathy, mild asthma,
2 persistent depressive disorder, and social anxiety disorder. AR 17.

3 Plaintiff states he suffers from emphysema, diabetes, Charcot-Marie-Tooth, sleep apnea,
4 arthritis, and depression. Dkt. 14, p. 1. The ALJ found Plaintiff’s diabetes, Charcot-Marie-Tooth,
5 sleep apnea, and depression were severe impairments. AR 17. Plaintiff contends he also suffers
6 from emphysema and arthritis, which the ALJ did not find to be severe impairments. *See* Dkt.
7 14; AR 17. However, Plaintiff fails to provide record citations showing he has been diagnosed
8 with emphysema or arthritis and fails to allege these two conditions cause significant limitations
9 in his ability to perform basic work activities. *See* Dkt. 14. Plaintiff does state his emphysema
10 contributes to his mobility issues. *Id.* at p. 2. He also states his arthritis causes his joints to be
11 even stiffer. *Id.* However, he does not cite to the record to support these assertions or explain
12 how his mobility issues and stiffer joints limit his ability to perform basic work activities. *See id.*
13 Furthermore, at the ALJ hearing, Plaintiff’s representative did not assert Plaintiff has been
14 diagnosed with or is disabled because of emphysema or arthritis. *See* AR 40. As Plaintiff failed
15 to explain how his emphysema and arthritis are severe impairments or cite to any evidence
16 supporting his assertion, the Court finds Plaintiff has not shown the ALJ erred at Step Two. *See*
17 *Shinseki v. Sanders*, 556 U.S. 396, 410 (2009) (finding the plaintiff has the burden of
18 demonstrating there are harmful errors in the ALJ’s decision).

19 **II. Whether the ALJ failed to properly consider Plaintiff’s combination of**
20 **impairments at Step Three.**

21 Plaintiff argues the ALJ erred by failing to consider Plaintiff’s combination of impairments.
22 Dkt. 14, p. 1. Plaintiff listed his “maladies” and then provided some general information regarding
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1 Charcot-Marie-Tooth Disease (“CMT”),⁴ one of Plaintiff’s severe impairments. *Id.* at pp. 1-2. The
2 Court finds Plaintiff is arguing the ALJ failed to consider whether the combination of his
3 impairments and, in particular, CMT met or equaled a Listing. *Id.*

4 At Step Three of the sequential evaluation process, the ALJ considers whether one or more
5 of the claimant’s impairments meets or equals an impairment listed in Appendix 1 to Subpart P of
6 the regulations. 20 C.F.R. § 404.1520(a)(4)(iii). Each Listing sets forth the “symptoms, signs, and
7 laboratory findings” which must be established in order for a claimant’s impairment to meet the
8 Listing. *Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999). If a claimant meets or equals a
9 Listing, the claimant is considered disabled without further inquiry. *See* 20 C.F.R. § 416.920(d).

10 The burden of proof is on the claimant to establish he meets or equals any of the
11 impairments in the Listings. *See Tackett*, 180 F.3d at 1098. “A generalized assertion of functional
12 problems,” however, “is not enough to establish disability at step three.” *Id.* at 1100 (citing 20
13 C.F.R. § 404.1526). A mental or physical impairment “must result from anatomical, physiological,
14 or psychological abnormalities which can be shown by medically acceptable clinical and
15 laboratory diagnostic techniques.” 20 C.F.R. § 404.1508. It must be established by medical
16 evidence “consisting of signs, symptoms, and laboratory findings.” *Id.*; *see also* Social Security
17 Ruling (“SSR”) 96–8p, 1996 WL 374184 *2 (a step three determination must be made on basis of
18 medical factors alone). An impairment meets a listed impairment “only when it manifests the
19 specific findings described in the set of medical criteria for that listed impairment.” SSR 83–19,
20 1983 WL 31248 *2. The ALJ “is not required to discuss the combined effects of a claimant’s
21 impairments or compare them to any listing in an equivalency determination, unless the claimant
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24 ⁴ CMT is “a degenerative neurological disorder that affects the structure and function of the nerves that
serve the extremities.” *Farley v. Astrue*, 2011 WL 653895, at *1 (D. Or. Feb. 14, 2011).

1 presents evidence in an effort to establish equivalence.” *Burch v. Barnhart*, 400 F.3d 676, 683 (9th
2 Cir. 2005).

3 In considering Step Three, the ALJ found that, although Plaintiff has severe physical
4 impairments, the impairments “do not meet the criteria of any listed impairments described in the
5 Listing of Impairments in Appendix 1 of the Regulations.” AR 18. The ALJ stated,

6 No treating or examining physician has reported clinical findings equivalent in
7 severity to the criteria of any listed impairment, nor does the evidence show medical
8 findings that were the same or equivalent to those of any listed impairment of the
9 Listing of Impairments.

10 AR 18. In reaching his conclusion, the ALJ stated he specifically considered Listings 1.02
11 (Major dysfunction of a joint due to any cause), 1.04 (Disorders of the spine), 3.00 (Respiratory
12 disorders), 9.00 (Endocrine disorders), and 11.14 (Peripheral neuropathy). AR 18. The ALJ also
13 considered Plaintiff’s obesity alone and in combination with his other impairments and
14 considered whether Plaintiff’s mental impairments met or equaled a Listing. AR 18-19.

15 Plaintiff asserts the ALJ did not properly consider his CMT. Dkt. 14. CMT is an
16 impairment that is considered under Listing 11.14, peripheral neuropathy. *See Dreher v. Comm’r*
17 *of Soc. Sec. Admin.*, 2016 WL 4920000, at *9 (N.D. Ohio June 7, 2016) (“Courts have previously
18 found limitations caused by Charcot-Marie-Tooth disease, determined by the ALJ as a severe
19 impairment, are properly analyzed under subsection 11.14.”); *Walters v. Colvin*, 604 Fed. App’x.
20 643, 645, 647 (10th Cir. 2015) (upholding ALJ’s finding that claimant with severe impairment of
21 Charcot-Marie-Tooth disease did not meet or equal Listing 11.14).

22 Here, the ALJ considered whether Plaintiff met or equaled Listing 11.14. Therefore, the
23 ALJ considered the appropriate Listing when determining if Plaintiff’s CMT met or equaled a
24 Listing. Plaintiff has not provided any evidence or explanation showing he meets or equals Listing
11.14, or any other Listing. *See* Dkt. 14. For example, Plaintiff failed to cite to any medical

1 evidence contained in the record showing his CMT meets or equals Listing 11.14. *See id.* Further,
2 at the ALJ hearings, Plaintiff's representative did not assert Plaintiff met or equaled a Listing. *See*
3 AR 40. Thus, Plaintiff has not shown the ALJ erred in finding Plaintiff's impairments did not meet
4 or equal a Listing at Step Three. *See Lewis v. Apfel*, 236 F.3d 503, 514 (9th Cir. 2001) (finding the
5 ALJ did not err at Step Three when the plaintiff offered no theory, plausible or otherwise, as to
6 how his impairments combined to equal a listed impairment or pointed to evidence showing his
7 combined impairments equal a listed impairment); *Scott v. Colvin*, 2013 WL 1562009, *5-6 (W.D.
8 Wash. March 20, 2013) (finding the plaintiff failed to show the ALJ erred at Step Three when the
9 plaintiff did not proffer any plausible theory as to how his combined impairments equaled a listed
10 impairment).

11 **III. Whether the ALJ properly considered Plaintiff's limitations.**

12 Last, Plaintiff argues he cannot work because he frequently falls, has numbness in his
13 hands and feet, and he cannot be on his feet for even a short period of time. Dkt. 14, p. 2. The
14 Court finds Plaintiff is challenging the ALJ's RFC determination.

15 A claimant's RFC is the maximum amount of work the claimant is able to perform based
16 on all of the relevant evidence in the record. Social Security Ruling ("SSR") 96-8p, 1996 WL
17 374184 *2. However, a claimant's inability to work must result from his or her "physical or
18 mental impairment(s)." *Id.* Thus, the ALJ must consider only those limitations and restrictions
19 "attributable to medically determinable impairments." *Id.* In assessing a claimant's RFC, the ALJ
20 is also required to discuss why the claimant's "symptom-related functional limitations and
21 restrictions can or cannot reasonably be accepted as consistent with the medical or other
22 evidence." *Id.* at *7.

1 In this case, the ALJ found Plaintiff has the RFC to perform less than the full range of
2 light work with the following limitations:

3 The claimant can perform jobs that involve two hours of standing or walking in an
4 eight-hour workday. He can occasionally climb, stoop, kneel, crouch, and crawl.
5 The claimant can perform jobs that allow him to avoid concentrated exposure to
6 extreme temperatures, vibrations, pulmonary irritants, and hazards. He can handle,
finger, and feel frequently with the bilateral upper extremities. The claimant can
occasionally operate foot controls. Additionally, the claimant can perform unskilled
and semiskilled tasks consistent with an SVP up to SVP 4.

7 AR 19-20.

8 Plaintiff states he is unable to be on his feet for even a short period of time and he is
9 unable to grip items. Dkt. 14. Plaintiff explained how his impairments limit his ability to work.

10 *Id.* For example, Plaintiff states diabetes can cause fatigue and contributes to the numbness in his
11 extremities, he frequently drops things, his emphysema contributes to his mobility issues, and he
12 cannot walk more than a couple of blocks without stopping to catch his breath. *Id.* at p. 2.

13 Plaintiff is asserting the ALJ did not properly account for all his limitations in determining
14 Plaintiff's RFC and finding Plaintiff is capable of performing his past work as a tax return
15 preparer.

16 A review of the record shows there are three medical opinions related to Plaintiff's
17 physical limitations, which were completed by Drs. Guillermo Rubio, M.D., Donna LaVallie,
18 D.O., and John Coe, D.O. *See* AR 105-119, 121-132, 442-450. The ALJ considered these three
19 opinions when determining Plaintiff's RFC. *See* AR 24-25. He explained the weight assigned to
20 each opinion and provided detailed reasons for discounting any portion of the opinions. Plaintiff
21 does not reference these medical opinions in his Opening Brief, nor assert that the ALJ erred in
22 considering the medical evidence. *See* Dkt. 14. Therefore, the Court finds Plaintiff has not shown
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1 the ALJ erred in his consideration of the medical opinion evidence when determining the RFC
2 and finding Plaintiff could perform his past relevant work.

3 Plaintiff also does not assert the ALJ failed to properly consider Plaintiff's subjective
4 symptom testimony, or the lay evidence. *See* Dkt. 14. Further, Plaintiff has not identified any
5 significant, probative evidence the ALJ failed to consider and has not provided specific
6 arguments as to why the ALJ's determination of the RFC is not supported by substantial
7 evidence or contains legal error. *See id.*

8 The Court also notes Plaintiff testified that he can stand or walk for an hour and a half at
9 one time, which is not inconsistent with the ALJ's finding that Plaintiff can perform a job that
10 involves two hours of standing or walking total in an eight-hour day. AR 19, 55. Additionally,
11 during a consultative examination with Dr. Coe, Plaintiff's right grip strength tested at "65-65-
12 60" pounds and his left grip strength tested at "65-60-55" pounds. AR 445. Plaintiff's wrists had
13 normal range of motion and his finger approximation was intact. AR 447. Dr. Coe, who provided
14 the most limiting opinion regarding Plaintiff's physical impairments, found Plaintiff had no
15 postural or manipulative limitations. AR 448. Therefore, there is unchallenged evidence in the
16 record supporting the ALJ's RFC determination regarding Plaintiff's ability to stand/walk and
17 grip.

18 For the above stated reasons, the Court finds Plaintiff has not shown the ALJ erred in
19 determining the RFC. *See Ludwig v. Astrue*, 681 F.3d 1047, 1054 (9th Cir. 2012) ("The burden
20 is on the party claiming error to demonstrate not only the error, but also that it affected his
21 "substantial rights."); *Crawford v. Colvin*, 2014 WL 2216115, *9 (W.D. Wash. May 29, 2014)
22 (finding the plaintiff failed to demonstrate error when she failed to demonstrate the ALJ's
23 reliance on other evidence and interpretation of the evidence overall was not rational).

1 CONCLUSION

2 Based on the foregoing reasons, the Court hereby finds the ALJ properly concluded
3 Plaintiff was not disabled. Accordingly, Defendant's decision to deny benefits is affirmed
4 pursuant to sentence four of 42 U.S.C. § 405(g).

5 Dated this 10th day of April, 2018.

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8 David W. Christel
9 United States Magistrate Judge
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